EDRIS SUBELI & ORS

v.

CITY MORTGAGE SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
RHODZARIAH BUJANG JC
[CIVIL APPEAL NO: 11-5-2009-II]
30 APRIL 2009

CIVIL PROCEDURE: *Striking out - Claims - Appellants' appeal against magistrate's decision in refusing to dismiss respondent's claim for outstanding sum under a hire purchase agreement - Whether claim settled by Consumer Claims Tribunal - Whether award of Tribunal final and binding - Consumer Protection Act 1999, s. 116 - Whether there was clear contravention of s. 104 of the Consumer Protection Act 1999 - Whether appeal allowed*

The first appellant (hirer) and his two guarantors (the second and third appellants) appealed against the decision of the magistrate in refusing to dismiss the respondent's (owner) claim against them. Their ground for applying to strike out the respondent's action was that the Consumers Claims Tribunal had adjudicated the claim made by the respondent and delivered an award which bound the parties. In the magistrate's court, the respondent sued the appellants for the sum of RM23,397.86 being the amount outstanding under a hire purchase agreement executed by the first appellant and to which the other two appellants stood as guarantors. The subject matter of the agreement was a second hand Toyota Lite vehicle. The appellants contended, *inter alia*, that the claim of the respondent was settled by the Consumers Claims Tribunal and an award was pronounced by the Tribunal to the effect that one Chung Soon Chiang who had agreed to buy the vehicle from the first appellant was to pay the sum outstanding to the respondent by monthly instalments. Prior to the pronouncement of the award, the said Chung Soon Chiang and the first appellant had entered into a deed of settlement whereby the said Chung Soon Chiang agreed to purchase the vehicle from the first appellant and agreed to settle the outstanding balance under the hire purchase agreement to the respondent. The respondent, however, contended that this deed of settlement was entered after they commenced this action in the magistrate's court against the appellants and the first appellant lodged a claim with the tribunal when Chung Soon Chiang had breached the term of

A deed of settlement by failing to pay the amount outstanding under the hire purchase agreement to the respondent. It was deposed that the respondent attended the hearing of the Tribunal and informed the Tribunal that it should not have been included in the proceedings as the matter complained of was between the first
B appellant and Chung Soon Chiang. However, this was not reflected in the award of the Tribunal. The issue that arose was whether the magistrate court or the appellate court could ignore the award of the Tribunal.

C **Held:**

(1) The magistrate or the appellate court could not ignore the award of the Tribunal. The Tribunal is a creature of statue, just like the Industrial Court, s. 116 of the Consumer
D Protection Act 1999 of the Act provides that the award it made shall be final and binding on all parties to the proceedings and shall be deemed to be an order of a magistrate's court and be enforced accordingly. Therefore, just like an award made by the Industrial Court, the decision of
E the Tribunal could only be set aside by a dissatisfied party, like the respondent, by an order of *certiorari*. It was this course of action that the respondent was advised to adopt. However, this court was not minded to strike out the respondent's claim herein because on the face of the record there was a clear
F contravention of s. 104 of the Act. It would be unjust to blindly make an order depriving the respondent of their right when the Tribunal may have made an error of law when adjudicating the dispute which was the subject matter of the respondent's claim against the appellant. This court allowed
G the appeal but made an order that the proceedings in the magistrate's court be stayed (and not struck out) until a decision is made respecting the award made by the Tribunal. (paras 10, 12 & 13)

[Order accordingly.]

H

Legislation referred to:
Consumer Protection Act 1999, ss. 98, 104, 116

For the appellants - Hasiera Hashim; M/s Azmi & Co Advocates
For the respondent - Daisy Tham Yek Ngo; M/s Tham & Co Advocates

I

Reported by Suhainah Wahiduddin

JUDGMENT

Rhodzariah Bujang JC:

[1] This appeal was brought by the 1st appellant (hirer) and his two guarantors (the 2nd and 3rd appellants) against the decision of the learned magistrate in refusing to dismiss the respondent's (owner) claim against them. Their ground for applying to strike out the respondent's action was that the consumer claims Tribunal had adjudicated the claim made by the respondent and delivered an award which bound the parties.

The Respondent's Action

[2] In the magistrate's court, the respondent sued the appellants for the sum of RM23,397.86 being the amount outstanding under a hire purchase agreement dated 12 April 2006 executed by the 1st appellant and to which the other two appellants stood as guarantors. The subject matter of the agreement was a second-hand Toyota Lite vehicle.

[3] In their defence the appellants contended, *inter alia*, that the claim of the respondent was settled by the consumers claims tribunal and an award was pronounced by the Tribunal to the effect that one Chung Soon Chiang who has agreed to buy the vehicle from the 1st appellant was to pay the sum outstanding to the respondent (for RM28,000) by monthly instalments. Prior to the pronouncement of the award, the said Chung Soon Chiang and the 1st appellant have entered into a deed of settlement dated 16 August 2006 whereby the said Chung Soon Chiang agreed to purchase the vehicle from the 1st appellant and agreed to settle the outstanding balance under the hire purchase agreement in the sum of RM23,397.86 (as at 12 April 2006) to the respondent with interest and cost.

[4] The respondent contended that this deed of settlement was entered after they commenced this action in the magistrate's court against the appellants and the 1st appellant lodged a claim with the Tribunal when Chung Soon Chiang had breached the term of the deed of settlement by failing to pay the amount outstanding under the hire purchase agreement to the respondent. In the same affidavit of Liu Bee Hong affirmed on 27 August 2007 (at p. 12 of the supplementary appeal record) it was deposed that the

respondent attended the hearing of the Tribunal and informed the Tribunal that it should not have been included in the proceedings as the matter complained of was between the 1st appellant, Chung Soon Chiang and Chin Ken Siong (the sales representative also arranged the sale of the vehicle between the 1st appellant and Chung Soon Chiang).

[5] However, this was not what was reflected in the award of the Tribunal appearing at p. 69 of the appeal record. The respondent was clearly named as a party together with Chung Soon Chiang and Chin Ken Siong. The substance of the award was to direct Chung Soon Chiang to pay the respondent RM10,000 on or before 19 January 2007 and the remaining sum of RM18,000 was to be paid by monthly instalments of RM1,000 per month with effect from February 2007 until full settlement.

[6] The issue therefore is, what is the effect of this award on the proceedings in the magistrate's court.

[7] For starters, it is clear that the award made by the Tribunal was for payment of, in total of RM28,000 and that it exceeded its jurisdiction which under s. 98 of the Consumer Protection Act 1999 ("the Act") is capped at RM25,000. However, under s. 100 of the Act, the parties can agree in writing to give the Tribunal jurisdiction in excess of that limit. It is to be noted that there is no evidence of such agreement in the Appeal Record.

[8] Another material provision of the Act is s. 104 which bars the Tribunal from adjudicating a claim which is the subject of a court proceedings when the court proceedings was instituted first (as in this case) unless the claim before the court was withdrawn, abandoned or struck out.

[9] There is also no evidence disclosed in the proceedings whether the Tribunal was aware that there is a pending action in the magistrate's court before it proceeded with the claim and made the award. What is clear is there were these simultaneous proceedings filed in court and with the Tribunal over the substantive issue of the balance due under the hire purchase agreement.

[10] The question now is whether the learned magistrate or the appellate court can ignore this award of the Tribunal. I think not. The Tribunal is a creature of statute, just like the Industrial Court and s. 116 of the Act provides that the award it made shall be final and binding on all parties to the proceedings and shall be deemed to be an order of a magistrate's court and be enforced accordingly.

[11] Therefore, just like an award made by the Industrial Court, the decision of the Tribunal can only be set aside by a dissatisfied party, like the respondent, by an order of *certiorari*. It is this course of action that the respondent is advised to adopt.

[12] Having said that, however, I am not minded to strike out the respondent's claim herein because on the face of the record there is a clear contravention of the provision of s. 104 of the Act. It would be unjust to blindly make an order depriving the respondent of their right when I know that the Tribunal may have made an error of law when adjudicating the dispute which is the subject matter of the respondent's claim against the appellant.

[13] The right thing to do would be to allow the appeal but to make an order that the proceedings in the magistrate's court be stayed (and not struck out) until a decision is made respecting the award made by the Tribunal. In view of this decision, I would only allow the appellants half of the cost of the appeal to be taxed unless agreed.